*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

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| *UNITED STATES OF AMERICA* | ) | |
| | ) | |
| *v.* | ) | *Criminal No. 01-31-P-H* |
| | ) | |
| *ERIN C. SULLIVAN,* | ) | |
| | ) | |
| *Defendant* | ) | |

*RECOMMENDED DECISION ON MOTION TO SUPPRESS*

The defendant, charged with conspiracy to distribute and to possess with intent to distribute cocaine base, and aiding and abetting the distribution of cocaine base, all in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(B) and 846 and 18 U.S.C. § 2, seeks suppression of "all evidence . . . obtained from [her] person as a result of a traffic stop [that] took place in Saco, Maine at approximately 12:30 AM on March 20, 2001." Motion to Suppress Evidence (Docket No. 17) at [1]. She contends that she was arrested without probable cause and that any subsequent search was illegal, thereby requiring suppression of any evidence generated by any such search. *Id*. at [3]. At the evidentiary hearing held before me on June 18, 2001, the only evidence mentioned was $376 in cash and a pink slip of paper, and I accordingly assume that this is the evidence to which the motion refers, even though this evidence was not obtained from the person of the defendant. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

**I. Proposed Findings of Fact**

An undercover agent of the Maine Drug Enforcement Agency ("MDEA") purchased crack cocaine from Reginald Brown, also known as "Knowledge," on March 18, 2001 at 125 Lincoln Street

in Saco, Maine, the residence of Kenneth Scott. Brown arrived at this address in a white Dodge Neon. Scott told the agent that Brown was his source for crack cocaine and that Brown would be at Scott's residence again between 12:00 and 12:30 a.m. on March 20, 2001. A white Dodge Neon pulled up to Scott's residence at about 12:45 a.m. that day. The defendant was a passenger in the car.

Agent Gerard Hamilton, Jr. was in an unmarked vehicle parked a block away from Scott's residence monitoring the electronic listening device worn by the undercover agent and coordinating the traffic stop of the Neon that had been planned by MDEA and the Saco Police Department to take place after the second sale of cocaine had occurred. Brown went into Scott's residence, and Hamilton knew from what he heard on the undercover agent's "wire" that Brown then sold cocaine to the undercover agent. Brown came out of the house, got into the Neon, and drove off. Hamilton followed the Neon in his vehicle and directed officers of the Saco Police Department to intercept the Neon at the corner of Lincoln and Maple Streets. Two marked Saco Police Department cars fell in behind the Neon and put on their lights. The Neon then accelerated for approximately one-tenth of a mile, turned sharply into a driveway and stopped. Brown got out of the driver's side of the Neon and ran toward the back yard of the house served by the driveway.

Hamilton, observing a number of officers and agents chasing Brown and aware of the presence of a passenger in the Neon, chose to approach the Neon "as a safety issue." He went up to the Neon on the passenger side and stood at a point between the two doors. He saw the defendant, seated in the right front seat, watch the chase of Brown and then look to her right, although she did not see him. He then watched the defendant attempt unsuccessfully to remove the cover on an air vent on the right side of the dashboard of the Neon. The defendant then pulled the cover off one of the air vents on the center of the dashboard, reached into the purse between her legs, and took out cash, which she placed in the air vent. She reached into the purse again, removing more cash and a pink slip of paper which she

also placed in the vent. She then replaced the cover on the air vent and started to make a call on a cell phone. Hamilton took the phone and directed the defendant to step out of the car. He did a pat-down search of the defendant and found nothing. Another MDEA agent took the defendant into custody.

Hamilton was asked to drive the Neon to the Saco Police Department and to perform an inventory on the vehicle, which he proceeded to do. He found $376 and a pink slip of paper, a copy of one side of which is Exhibit 1, in the air vent whose cover he had seen the defendant remove and replace. He also found another cell phone in the trunk of the car.

Hamilton did not see a weapon while he observed the defendant. He was not worried about his own safety at the time he saw the defendant hiding the cash and the piece of paper.

**II. Discussion**

In the First Circuit, a court must

> determine whether an arrest was supported by probable cause using a "totality of the circumstances" standard. Under this standard, the government bears the burden of establishing that, at the time of the arrest, the facts and circumstances known to the arresting officers were sufficient to warrant a reasonable person in believing that the individual had committed or was committing a crime. [T]his does not require the government to present evidence sufficient to convict the individual, but merely enough to warrant a reasonable belief that [s]he was engaging in criminal activity.

*United States v. Reyes*, 225 F.3d 71, 75 (1st Cir. 2000) (citations omitted). The defendant argues, correctly, that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause," *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), but in this case there are "additional circumstances from which it is reasonable to infer participation in criminal enterprise," *United States v. Martinez-Molina*, 64 F.3d 719, 726 (1st Cir. 1995).

> In assessing the significance of a defendant's association to others independently suspected of criminal activity, the [*United States v.*] *Hillison*[, 733 F.2d 692 (9th Cir. 1984)] court looked to whether the known criminal activity was contemporaneous with the association and whether the circumstances suggest that the criminal activity could have been carried on

> without the knowledge of all persons present. *See Hillison*, 733 F.2d at 697 (citations omitted). Other courts have focused on the nature of the place in which the arrest occurred and whether the individual himself was behaving suspiciously or was merely "tainted" by another. *See United States v. Tehrani*, 49 F.3d 54, 59 (2d Cir. 1995).

*Id*. at 727. Here, the defendant's association with Brown was contemporaneous with the drug deal and she was arrested after Brown, with whom she left the scene of the deal, had attempted to flee from the police. "While this association might not alone give rise to probable cause, the officers were plainly reasonable in considering it," *Reyes*, 225 F.3d at 76, because "criminals rarely welcome innocent persons as witnesses to serious crimes and rarely seek to perpetrate felonies before larger-than-necessary audiences," *Martinez-Molina*, 64 F.3d at 729. In this case, Hamilton had also observed the defendant acting in a suspicious manner when it became obvious that her companion was seeking to avoid contact with the police. Police officers are not required to consider whether there might possibly be an innocent explanation for apparently furtive behavior when determining whether to arrest an individual. *See generally United States v. McCarty*, 862 F.2d 143, 147 (7th Cir. 1988) (defendant's "furtive gesture" reinforced reasonableness of officers' belief that defendant had committed a crime); *Martinez-Molina*, 64 F.3d at 728 (use of cell phone, "a known tool of the drug trade," may also be considered in evaluation of totality of circumstances (citation and internal punctuation omitted)), 729 (facts need not conclusively rule out innocent explanation). Here, the defendant's behavior gave rise to a reasonable inference that she herself was involved in criminal activity. Even if putting the cash and the piece of paper into the air vent could itself be viewed as an innocent act, a proposition that I do not accept, "[t]he succession of superficially innocent events had proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one." *United States v. Drake*, 673 F.2d 15, 18 (1st Cir.

1982) (quoting *United States v. Patterson*, 492 F.2d 995, 997 (9th Cir. 1974). Nothing further was required.

Hamilton's inventory search of the Neon was accordingly incident to impounding the vehicle as a consequence of the lawful arrests of Brown and the defendant and provides no basis for suppression. *United States v. Staula*, 80 F.3d 596, 603 (1st Cir. 1996).

**III. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion to suppress be **DENIED**.

***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

Date this 21st day of June, 2001.

David M. Cohen
United States Magistrate Judge

U. S. Attorneys:

JONATHAN A. TOOF
780-3257
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257

ERIN C SULLIVAN (2) ROBERT M. NAPOLITANO

defendant 774-4109
765 CONGRESS STREET
PORTLAND, ME 04102